IN THE COURT OF APPEALS OF TENNESSEE AT KNOXVILLE

Assigned on Briefs February 25, 2005

IN THE MATTER OF: L.T.P. (DOB: December 28, 2000)

Appeal from the Circuit Court for Cocke County No. 28,689-IV O. Duane Slone, Judge

No. E2004-02085-COA-R3-PT - FILED MARCH 29, 2005

The trial court terminated the parental rights of C.P. ("Mother") with respect to her minor child, L.T.P. ("the child") (DOB: December 28, 2000), and granted the petition of J.A.B. ("the Petitioner") to adopt the child. Mother appeals, arguing, *inter alia*, that she was not properly served with the petition to terminate her parental rights, and that she was not afforded all of the rights guaranteed to her by Tenn. Code Ann. § 36-1-113(f) (Supp. 2004). We reverse and dismiss the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded with Instructions

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Lucy D. Hooper, Newport, Tennessee, for the appellant, C.P.

No appearance on behalf of the appellee, J.A.B.

OPINION

Ī.

On December 10, 2003, the Petitioner filed a petition to terminate the parental rights of Mother¹ with respect to the child. She seeks to adopt the child. In the petition, the Petitioner alleged that Mother was incarcerated at the Tennessee Prison for Women ("the TPFW") in Nashville; that the child is the Petitioner's cousin; that the child had resided with the Petitioner for over two years; and that Mother had abandoned the child within the meaning of the pertinent statute by willfully

¹The petition also seeks to terminate the parental rights of the child's biological father, whose identity was apparently unknown to the Petitioner. His rights were also terminated by the trial court. He is not identified in the record. It goes without saying that his case is not before us on this appeal.

failing to support her and by willfully failing to visit for more than four months immediately prior to the filing of the petition. The petition further states that it would be in the child's best interest to terminate Mother's parental rights and allow the Petitioner to adopt the child. The petition concludes with a request that Mother be served with process and that she be required to appear and answer the petition.

While the Petitioner clearly averred that Mother was incarcerated in Nashville when suit was filed, service on her was attempted by way of publication. A non-resident notice was filed in the trial court on May 17, 2004, directing that notice of the termination hearing be published in a local newspaper, the Newport Plain Talk, for four consecutive weeks. The notice required that Mother and the child's unknown father answer the petition or suffer judgment by default. The notice stated that a termination hearing was set for July 23, 2004, at 9:00 a.m. before the Honorable O. Duane Slone, Circuit Judge.

On June 7, 2004, the Petitioner's attorney received a handwritten letter from Mother, in which Mother stated as follows:

I am currently incarcerated at Tennessee Prison for Women, at the time the Petition for Termination of Parental Rights and Adoption and Non-Resident notice was run in the Newport Plain Talk[.] I had no way of seeing this nor knowing of this ad. We do not receive Newport Plain Talk newspapers here. I have been incarcerated since February 26, 2003. I have no way of seeing my child [L.T.P.], because of my incarceration. I understand that there is a court date for July, 23rd. The only way I would be able to make it is if someone comes get [sic] me or bring me. I am not willing to give up my Parental Rights.

Sincerely

/s/ [C.P.]

This letter was filed in the trial court on June 8, 2004.

The petition was heard on July 23, 2004. Mother was not present at the hearing and did not participate by telephone conference or otherwise. She was not represented by counsel. The trial court entered its judgment on August 13, 2004, terminating Mother's parental rights on the ground of abandonment. The judgment also granted the Petitioner's request to adopt the child. The judgment provides, in pertinent part, as follows:

[C.P.] . . . is currently an inmate in the Tennessee Department of Corrections . . . and she was served with process at [the TPFW] located at 3881 Stewarts Lane, Nashville, Tennessee 37243 on June

1, 2004. Notice of this hearing was timely given to [C.P.]. On docket call, [C.P.] failed to respond and hearing was held *ex-parte*, in chambers.

Thereafter, Mother filed a notice of appeal in the trial court and moved for the appointment of counsel on the basis of her indigence. Mother's motion was subsequently granted and she was appointed counsel to represent her on this appeal.

II.

Our review of this non-jury case is *de novo*; however, the record² comes to us accompanied by a presumption of correctness as the trial court's factual findings that we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d). No presumption of correctness attaches to the lower court's conclusions of law. *Jahn v. Jahn*, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996).

III.

Mother first contends that the trial court erred in terminating her parental rights because, so the argument goes, she was not properly served with process on the petition. Mother bases her argument on the fact that "[n]o evidence of service by mail exists in the court record."

The record before us does not contain evidence that personal service was ever effected on Mother. In fact, the record affirmatively reflects that, at one time, there was a notice filed in the trial court "lumping" Mother with the unknown father of the child in a directive for newspaper publication.

Tenn. R. App. P. 24(a) sets forth the required contents of a record on appeal:

(1) copies, certified by the clerk of the trial court, of all papers filed in the trial court except as hereafter provided; (2) the original of any exhibits filed in the trial court; (3) the transcript or statement of the evidence or proceedings, which shall clearly indicate and identify any exhibits offered in evidence and whether received or rejected; (4) any requests for instructions submitted to the trial judge for consideration, whether expressly acted upon or not; and (5) any other matter designated by a party and properly includable in the record as provided in subdivision (g) of this rule.

²The record is sparse, to say the least: a six-page petition; a one-page non-resident notice; Mother's undated one-page letter; a six-page judgment reflecting service of same on Mother at the TPFW; a one-page notice of appeal; and a motion for appointment of counsel with a motion in forma pauperis. The record does not contain evidence that the non-resident notice was published as directed; however, Mother's letter clearly indicates that it was. There is no transcript of the July 23, 2004, hearing.

The rule goes on to state that certain papers filed in the trial court are to be *excluded* from the record, including "subpoenas or summonses for any witness or for any defendant when there is an appearance for such defendant."

We can conclude that one of two things happened in this case: either, as appears to be the case, no attempt was ever made to effect personal service on Mother; or the clerk of the trial court treated Mother's letter as an appearance by her and, pursuant to Rule 24(a), determined that Mother's summons did not have to be included in the "technical record" on appeal.

The trial court, in its judgment, expressly states that Mother "was served with process at [the TPFW] located at 3881 Stewart Lane, Nashville, Tennessee 37243 on June 1, 2004." The record before us does not support this finding. On the contrary, the record strongly suggests that service was attempted by publication. Such service would obviously be insufficient when the Petitioner knew, and affirmatively averred in her petition, that Mother was at the TPFW in Nashville when the petition was filed. *See* Tenn. R. Civ. P. 4.04(1) and (10).

The letter from Mother was apparently filed in the trial court by the Petitioner's counsel. The letter seems to have been in response to the non-resident notice in the Newport newspaper. In view of the fact that this case involves an attempt to terminate Mother's constitutionally-protected parental rights, we are unwilling to treat the filing of the letter in the trial court by the Petitioner's counsel as an appearance by Mother in this matter. There is nothing in the record indicating that Mother intended, by writing and mailing the letter, to make a formal appearance, thereby absolving the Petitioner of her obligation to obtain personal service of process on Mother in Nashville.

Since Mother was not served in person, the trial court never obtained *in personam* jurisdiction over her. This is a fatal flaw and one that necessitates a reversal by us of the trial court's judgment and a dismissal of the petition. In view of our disposition of this appeal, we do not find it necessary or appropriate to consider Mother's other issues pertaining to Tenn. Code Ann. § 36-1-113(f).

IV.

The judgment of the trial court is reversed and the petition is hereby dismissed, with costs on appeal and at the trial court taxed to J.A.B. This case remanded for collection of the trial court's costs, pursuant to applicable law.

CHARLES D. SUSANO, JR., JUDGE